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IN THE

Supreme Court of the United States

October Term, 1959

No. 275

In the Matter of LOCAL 824, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (Ind.),

Petitioner,

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

In the Matter of JOHN BOWERS,

Petitioner,

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

HENRY A. LOWENBERG
Attorney for Petitioners
54 Chambers Street
New York, N. Y.

Case Press & Co., 82 Beekman St., N. Y. BEekman 3-2005

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The petitioners, the appellants below, pray that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York, entered on the 29th day of May, 1959, dismissing the appeal upon the ground that the asserted constitutional questions are not directly involved from the order of the Appellate Division of the

Supreme Court of the State of New York, First Department, affirming the order of Mr. Justice Saul Streit, of the Supreme Court of the State of New York, New York County, denying the motions made to quash, vacate and set aside the subpoenas duces tecum served upon Local 824 of the International Longshoremen's Association (Ind.), and John Bowers, an officer of Local 824 of the International Longshoremen's Association (Ind.).

Reasons for Granting the Writ:

I. Section 8 of the Waterfront Commission Act is directly involved and presents constitutional questions.

II. Section 8 of the Waterfront Commission Act violates Article I, Section 10, Clause 3 of the Constitution of the United States, in that it does not implement the Waterfront Commission Compact as approved by the Congress of the United States, but rather enlarges the political power of the State of New York in violation thereof.

III. Section 8 of the Waterfront Commission Act violates Amendment XIV of the Constitution of the United States and Article I, Section 6, Subdivision 3 of the Constitution of the State of New York, in that by direction and/or indirection it deprives Local 824 of the International Longshoremen's Association (Ind.) of its right to property in the form of dues, assessments, fines, etc. without due process of law.

IV. Section 8 of the Waterfront Commission Act violates Amendment XIV of the Constitution of the United States and Article I, Section 6, Subdivision 3 of the Constitution of the State of New York in that it imposes upon a prospective violator of the Act an obligation in ascertaining the criminal history or the lack of such criminal history of each and every officer and agent of the Local and/or Union which goes beyond the scope of reasonableness and therefore deprives a prospective violator of his liberty without due process of law.

V. Section 8 of the Waterfront Commission Act violates Article I, Section 8, Clause 3 and Article VI, Clause 2, of the Constitution of the United States, in that Congress has by the National Labor Relations Act and the Taft Hartley Act occupied the given area in the field of labor and industrial relations, and the said Section 8 of the Waterfront Commission Act is diametrically opposite and in direct conflict with the laws of Congress aforesaid.

VI. Section 8 of the Waterfront Commission Act violates Section 17 of Article I of the Constitution of the State of New York (Bill of Rights) in that by direction and/or indirection Section 8 of the Waterfront Commission Act denies to the members of Local 824 of the International Longshoremen's Association (Ind.) the right to choose their own collective bargaining representatives which inhibits and restrains the right to bargain collectively with respect to the proper and lawful goals and purposes of the said Local.

VII. Even though the petitioner Local 824 has already submitted to the Waterfront Commission of New York Harbor all of its books and records in accordance with the subpoenas served, and even though John Bowers, petitioner, an officer of Local 824, petitioner herein, also has been questioned, the constitutionality of Section 8 has not become moot and academic.

Statutes and Rules Involved

Article I, Section 10, Clause 3 of the Constitution of the United States:

"Agreement or Compact"

"In General"

"As respects their local government, the States are sovereign within their own limits and foreign to each other. *This sovereignty of the States in their relations with each other is qualified in that they have surrendered their treaty-making powers to the General Government,* and it is the right and duty of the General Government to protect the interests of the several States in their relations with each other." (Italics mine)

Amendment XIV, Section I of the Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Italics mine)

Article I, Section 8, Clause 3 of the Constitution of the United States:

> "The Congress shall have power . . . to regulate commerce with foreign nations, and among the Several States, and with the Indian Tribes."

Article 6, Clause 2 of the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."

Article I, Section 6, Subdivision 3 of the Constitution of the State of New York:

> "No person shall be deprived of life, liberty or property without due process of law."

Article I, Section 17 of the Constitution of the State of New York (Bill of Rights):

> "Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed."

* * *

"Employees shall have the right to organize and to bargain collectively through representatives of their own choosing."

Waterfront Commission Compact

Article I—Findings and Declarations:

"1. The states of New York and New Jersey hereby find and declare that the conditions under which waterfront labor is employed within the port of New York district are depressing and degrading to such labor, resulting from the lack of any systematic method of hiring, the lack of adequate information as to the availability of employment, corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character and integrity and neither responsive or responsible to the employers nor to the uncoerced will of the majority of the members of the labor organizations of the employees; that as a result waterfront laborers suffer from irregularity of employment, fear and insecurity, inadequate earnings, an unduly high accident rate, subjection to borrowing at usurious rates of interest, exploitation and extortion as the price of securing employment and a loss of respect for the law; that not only does there result a destruction of the dignity of an important segment of American labor, but a direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessaries handled in and through the port of New York district.

(McK. Unconsol. Laws 6700aa) (N.J.S.A. 32:23-2)"

* * * * *

"4. The states of New York and New Jersey hereby find and declare that the occupations of longshore-

men, stevedores, pier superintendents, hiring agents and port watchmen are affected with a public interest requiring their regulation and that such regulation shall be deemed an exercise of the police power of the two states for the protection of the public safety, welfare, prosperity, health, peace and living conditions of the people of the two states."

(McK. Unconsol. Laws 6700aa) (N.J.S.A. 32:23-5)"

Article II—Definitions:

"As used in this compact:

'The port of New York district' shall mean the district created by article II of the compact dated April thirtieth, nineteen hundred twenty-one, between the states of New York and New Jersey, authorized by chapter one hundred fifty-four of the laws of New York of nineteen hundred twenty-one and chapter one hundred fifty-one of the laws of New Jersey of nineteen hundred twenty-one.

'Commission' shall mean the waterfront commission of New York harbor established by article III hereof.

'Pier' shall include any wharf, pier, dock or quay.

'Other waterfront terminal' shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the port of New York district and which is used for waterborne freight in whole or substantial part.

'Person' shall mean not only a natural person but also any partnership, joint venture, association, corporation or any other legal entity but shall not include the United States, any state or territory thereof or any department, division, board, commission or authority of one or more of the foregoing.

'Carrier of freight by water' shall mean any person who may be engaged or who may hold himself out as willing to be engaged, whether as a common carrier, as a contract carrier or otherwise (except for carriage of liquid cargoes in bulk in tank vessels designed for use exclusively in such service or carriage by barge of bulk cargoes consisting of only a single commodity loaded or carried without wrappers or containers and delivered by the carrier without transportation mark or count) in the carriage of freight by water between any point in the port of New York district and a point outside said district.

'Waterborne freight' shall mean freight carried by or consigned for carriage by carriers of freight by water.

* * * * * *

'Waterborne freight' shall also include freight described in subdivision (1) of this section [§5-a(1), page 5] and ships' stores, baggage and mail carried by or consigned for carriage by carriers of freight by water. [§5-a(2); McK. Unconsol. Laws 6700tf-1; N.J.S.A. 32:23-85)

* * * * * *

'Longshoreman' shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore

(a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or

(b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores, or

(c) to supervise directly and immediately others who are employed as in subdivision (a) of this definition.

* * * * * *

'Longshoreman' shall also include a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore physically to perform labor or services incidental to the movement of waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, including, but not limited to, cargo repairmen, coopers, general maintenance men, mechanical and miscellaneous workers, horse and cattle fitters, grain ceilers and marine carpenters. [§5-a(6); McK. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85]

'Checker' shall mean a longshoreman who is employed to engage in direct and immediate checking of waterborne freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores. [§5-a(5); McK. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85]

* * * * * *

'Pier superintendent' shall mean any natural person other than a longshoreman who is employed for work at a pier or other waterfront terminal by a carrier of freight by water or a stevedore and whose work at such pier or other waterfront terminal includes the supervision, directly or indirectly, of the work of longshoremen.

'Port watchman' shall include any watchman, gateman, roundsman, detective, guard, guardian or protector of property employed by the operator of any pier or other waterfront terminal or by a carrier of

freight by water to perform services in such capacity on any pier or other waterfront terminal.

'Longshoremen's register' shall mean the register of eligible longshoremen compiled and maintained by the commission pursuant to article VIII.

'Stevedore' shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

* * * * *

'Stevedore' shall also include contractors engaged for compensation pursuant to a contract or arrangement with the United States, any state or territory thereof, or any department, division, board, commission or authority of one or more of the foregoing, in moving freight carried or consigned for carriage between any point in the port of New York district and a point outside said district on vessels of such a public agency berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals. [§ 5-a(1); McK. Unconsol. Law § 6700t-1; N.J.S.A. 32:23-85]

* * * * * *

'Hiring agent' shall mean any natural person, who on behalf of a carrier of freight by water or a stevedore shall select any longshoreman for employment.

* * * * *

The term 'select any longshoreman for employment' in the definition of a hiring agent in article II of this act shall include selection of a person for the commencement or continuation of employment as a

longshoreman, or the denial or termination of employment as a longshoreman. [§ 5-a(8); McK. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85]

* * * * *

'Compact' shall mean this compact and rules or regulations lawfully promulgated thereunder.

* * * * *

'Compact' shall also include any amendments or supplements to the waterfront commission compact to implement the purposes thereof adopted by the action of the legislature of either the state of New York or the state of New Jersey concurred in by the legislature of the other. [§ 5-a(7); McK. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85]

'Court of the United States' shall mean all courts enumerated in section four hundred fifty-one of title twenty-eight of the United States code and the courts-martial of the armed forces of the United States. [§ 5-a(3); McK. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85]

'Witness' shall mean any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act. [§ 5-a(4); McK. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85]

* * * * * *

(McK. Unconsol. Laws 6700bb) (N.J.S.A. 32:23-6)"

* * * * *

Article XV—Collective Bargaining Safeguarded:

"1. This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other

way individually, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike.

(McK. Unconsol. Laws 6700oo) (N.J.S.A. 32:23-68)

"2. This compact is not designed and shall not be construed to limit in any way any rights of longshoremen, hiring agents, pier superintendents or port watchmen or their employers to bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise, provided that such employees shall be licensed or registered hereunder and such longshoremen and port watchmen shall be hired only through the employment information centers established hereunder and that all other provisions of this compact be observed.

(McK. Unconsol. Laws 6700oo) (N.J.S.A. 32:23-69)"

Article XVI of the Laws of Congress, Chapter 407:

"1. Amendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the Legislature of either State concurred in by the Legislature of the other.

"2. If any part or provision of this compact or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to be the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this

compact or the application thereof to other persons or circumstances and the two States hereby declare that they would have entered into this compact or the remainder thereof had the invalidity of such provision or application thereof been apparent.

"3. In accordance with the ordinary rules for construction of interstate compacts this compact shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof.

"4. This compact shall be known and may be cited as the 'Waterfront Commission Compact.'

"*Sec. 2. The right to alter, amend or repeal this Act is hereby expressly reserved.* (Italics mine)

"Approved August 12, 1953."

Article XV of the Waterfront Commission Compact:

"Collective Bargaining Safeguarded

I. This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike."

Section 7 of the National Labor Relations Act:

"Employees shall have the right to self organization, to form, join, or assist labor organization, *to bargain collectively through representatives of their own choosing*, and to engage in other concerted ac-

tivities for the purpose of collective bargaining or other mutual aid or protection; and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)." (Italics mine)

29 U. S. C. A. sec. 157.

Section 9(h) of the National Labor Relations Act:

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under Subsection (c) of this Section, and no complaint shall be issued pursuant to a charge made by a labor organization under Subsection (b) of Section 10 unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization that he is not a member of the Communist Party or affiliated with such party, and he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods . . ."

29 U. S. C. A. Sec. 159 (h).

82 C. J. S. Statutes, Section 323 at page 612:

"Declaration of Purpose"

"When the purpose of an act is expressed in clear and unambiguous terms, this must be accepted as the solemn declaration of the sovereign and be taken as true, unless incompatible within the meaning and

effect of the statute. Accordingly, the legislative declaration of purpose and policy is entitled to the gravest consideration unless overthrown by facts of record and a statute will, if possible, be given a construction which is consistent with its declared purpose. Ordinarily, where the law making power distinctly states its design, no place is left for construction."

Section 8 of the Waterfront Commission Act:

"*Collection of funds for unions having officers or agents who are felons.* No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability.

"As used in this section, the term 'labor organization' shall mean and include any organization which exists and is constituted for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection; but it shall not include a federation or congress of labor organizations organized on a national or international basis even though one of its constituent labor organizations may represent persons so registered or licensed.

(McK. Unconsol. Laws 6700ww)

"*Collection of funds for unions having officers or agents who are felons.* No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions, or other charges within the state of New Jersey from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of treason, murder, manslaughter or any felony, high misdemeanor or misdemeanor involving moral turpitude, unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct or other relief from disabilities arising from the fact of conviction from a board of parole or similar authority.

"As used in this section, the term 'labor organization' shall mean and include any organization which exists and is constituted for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection; but it shall not include a federation or congress of labor organizations organized on a national or international basis even though one of its constituent labor organizations may represent persons so registered or licensed.

"Any person who shall violate this section shall be guilty of a misdemeanor punishable by a fine of five hundred dollars ($500.00) or imprisonment for one year, or both.

(N.J.S.A. 32:23-80)"

Page 50 of Waterfront Commission Act as published by Waterfront Commission of New York Harbor:

* * * * *

> "*Liberal Construction.* This act * * * constitutes an agreement between the states of New York and New Jersey, supplementary to the waterfront commission compact *and amendatory thereof*, and shall be liberally construed to effectuate the purposes of said compact and the powers vested in the waterfront commission hereby shall be construed to be in aid of and supplemental to and not in limitation of or in derogation of any of the powers heretofore conferred upon or delegated to the waterfront commission." (*Printed by Waterfront Commission of New York Harbor on its own, not a part of the Compact or Subsequent Acts.*) (Italics mine.)

The Facts

The petitioner, Local 824, International Longshoremen's Association (Ind.) was served with a subpoena duces tecum and a personal subpoena was served upon John Bowers, petitioner herein, an officer of Local 824, International Longshoremen's Association (Ind.) by the Waterfront Commission of New York Harbor. The subpoena duces tecum provided that Local 824, International Longshoremen's Association (Ind.) produce all of its books and records before the Waterfront Commission of New York Harbor for inspection by the aforesaid Commission.

Motions were made in the Supreme Court of the State of New York to quash, vacate and set aside the subpoenas upon the ground that the Waterfront Commission of New York Harbor had no authority to issue the said subpoenas and that the petitioner, John Bowers was not the custodian

of the books and records of Local 824, International Longshoremen's Association (Ind.) and does not have the books and records in his possession and is not entitled to have such books and records in his possession. The said motions made by the petitioners before Mr. Justice Streit of the Supreme Court of the State of New York, New York County were denied.

A notice of appeal was then served and filed with the Appellate Division of the Supreme Court of the State of New York, First Department. The Appellate Division of the Supreme Court of the State of New York, First Department, granted a stay of the decision of Mr. Justice Streit of the Supreme Court, until such time as that Court heard the appeal and rendered its decision.

The Appellate Division of the Supreme Court of the State of New York, First Department, unanimously affirmed the order of Mr. Justice Streit of the Supreme Court of the State of New York, New York County, without opinion. A notice of appeal was then served and filed with the Court of Appeals of the State of New York, setting forth that there were constitutional questions directly involved which related to the Constitutions of the State of New York and of the United States.

A written notice of motion was then served and filed in the Court of Appeals of the State of New York by the respondent to dismiss this notice of appeal to the Court of Appeals of the State of New York on the grounds that the appeals could not be taken as of right and permission to appeal has not been obtained and that the controversy between the parties has become moot and academic. This motion made by the respondent was denied by the Judges of the Court of Appeals of the State of New York with leave

to renew upon the argument. Upon the argument, the motion was renewed. The majority of the Judges of the Court of Appeals of the State of New York rendered a decision, without opinion, dismissing the appeals upon the ground that the asserted constitutional questions are not directly involved in the decision appealed from.

Judges Froessel and Van Voorhies of the Court of Appeals of the State of New York dissented and Judge Froessel wrote a dissenting opinion in which Judge Van Voorhies concurred. A copy of the dissenting opinion of Judge Froessel, concurred in by Judge Van Voorhies of the Court of Appeals of the State of New York, is made a part of this petition.

In view of the fact that all of the remedies in the Courts of the State of New York have now been exhausted and in view of the fact that Section 8 of the Waterfront Commission Act presents constitutional questions which directly involve the Constitution of the State of New York and the Constitution of the United States, this petition for a Writ of Certiorari to the Court of Appeals of the State of New York, is being made directly to this Court.

POINT I

Section 8 of the Waterfront Commission Act is directly involved and presents constitutional questions.

On motions made in the Supreme Court of the State of New York, County of New York, to quash, vacate and set aside the subpoenas served herein, Mr. William P. Sirignano, counsel to the Waterfront Commission of New York Harbor, stated in his sworn affidavit in opposition to the motions:

"In order to eliminate some of the evil conditions on the waterfront, Section 8 of the Waterfront Commission Act was enacted to provide as follows:

'Section 8: *Collection of funds for unions having officers or agents who are felons.* No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability.'

* * * * *

"In the course of my official duties, I received information that the aforesaid John Keefe had resumed his connections with Local 824, a union local which represents persons registered with this Commission, and had received from Local 824 payments of over $12,000. in the year 1957.

"Subsequently (after the service of the subpoena on John Bowers, as described below), I received information in the course of my official duties that the aforesaid John Applegate had also resumed his connections with Local 824 and had received from Local 824 moneys in the sum of over $6,000. in 1957.

"Consequently, I authorized an investigation to determine what connection John Keefe had with Local 824 *and whether the aforesaid Sections of the Waterfront Commission Act was being violated.* On

> June 26, 1958, a subpoena was served on John Keefe, who appeared at the Waterfront Commission offices pursuant to such subpoena. However, when questioned as to the relationship between himself and Local 824 and as to his other waterfront activities, he refused to answer all questions, except to give his name and address and occupation as 'clerk', on the grounds that his answers might tend to incriminate him." (Italics ours)

His affidavit, under oath, further states that he authorized an investigation to determine what connections one John Keefe and one John Applegate had with the petitioner, Local 824, and whether the aforesaid Section 8 of the Waterfront Commission Act was being violated.

To quote from the affidavit of William P. Sirignano, counsel to the Waterfront Commission of New York Harbor, which affidavit, as has already been stated, was submitted in opposition to the motions to quash, vacate and set aside the subpoenas served herein, Mr. Sirignano further stated under oath:

> "Consequently, I authorized an investigation to determine what connection John Keefe had with Local 824, and whether the aforesaid Section 8 of the Waterfront Commission Act is being violated."

In the brief submitted by the Waterfront Commission of New York Harbor to the Appellate Division of the Supreme Court of the State of New York, First Department, on the appeal from the order denying the motions made to quash, vacate and set aside the subpoenas, the following language on page 35 of that brief can be found:

> "In addition the Commission is also seeking to ascertain whether Section 8 of the Act, one of the statu-

tory remedies designed to eliminate evil conditions on the waterfront, is being violated."

In the brief submitted by the Waterfront Commission of New York Harbor to the Court of Appeals of the State of New York, the following statement appeared on page 11 of the brief:

"• • • and since possible violations of Section 8 of the Waterfront Commission Act were involved • • •".

Upon the argument before the Court of Appeals of the State of New York, one of the Judges of the Court of Appeals asked Mr. Sirignano, counsel to the Waterfront Commission of New York Harbor, whether he was relying upon Section 8 of the Waterfront Commission Act. Mr. Sirignano answered "Yes".

Mr. Sirignano was then asked by the Court whether Section 8 had ever been submitted to the Congress of the United States for its approval, and Mr. Sirignano answered "No". In view of the foregoing, petitioners contend that there can be no question but that Section 8 of the Waterfront Commission Act is directly involved in this appeal. (Also see Opinion of Judge Froessel of the Court of Appeals, with Judge Van Voorhies concurring, Appendix B).

If Section 8 is unconstitutional then it is submitted that the subpoena duces tecum issued by the Waterfront Commission of New York Harbor for the production of all the records and books of the petitioner, Local 824, and the subpoena served upon John Bowers, an officer of the petitioner, Local 824, would fall and be ineffective.

The Waterfront Commission of New York Harbor in its brief to the Court of Appeals of the State of New York,

relied upon the fact that the constitutionality of Section 8 is not subject to collateral attack.

As has been already shown, Section 8 is directly involved. In addition thereto, the Waterfront Commission in its brief to the Court of Appeals of the State of New York, in support of this argument, relied upon two cases—*Blair* v. *United States*, 250 U. S. 273, and *Howat* v. *State of Kansas*, 258 U. S. 181.

In the case of *Blair* v. *U. S., supra*, a grand jury was conducting an inquiry. The grand jury is an arm of the Court. A grand jury has the power of subpoena. In the instant case the Waterfront Commission of New York Harbor is but an administrative body created by the Legislatures of the States of New York and New Jersey and approved by the Congress of the United States to carry out the purposes contained in Article I of the Waterfront Commission Compact.

It is inherent and natural that a grand jury should have the power of subpoena and that the investigation should not be limited narrowly by questions of propriety or by possible results of its investigation or by doubts whether any particular individual shall be found properly subject to an accusation for a crime.

But as has already been pointed out, the Waterfront Commission of New York Harbor is but an administrative body and not an arm of the Court, and therefore, the case of *Blair* v. *United States, supra,* does not in any way apply to the instant situation.

In the case of *Howat* v. *State of Kansas, supra*, a state subpoena had been issued by a court and that court had inherent and native power to issue a subpoena. It is illus-

trative that a court has the inherent and native power to issue a subpoena. But whether the Waterfront Commission of New York Harbor has the power to issue a subpoena under Section 8 of the Waterfront Commission Act is a section that presents constitutional questions to this Honorable Court.

POINT II

Section 8 of the Waterfront Commission Act violates Article I, Section 10, Clause 3 of the Constitution of the United States in that it does not implement the Waterfront Commission Compact as approved by the Congress of the United States but does enlarge the political power of the State of New York in violation thereof.

The Waterfront Commission Compact is divided into three parts, the first part having been approved by the Congress of the United States because it is a compact between the States of New York and New Jersey which required the consent and approval of the Congress of the United States. Parts two and three of the Compact and Laws were passed by the Legislatures of the States of New York and New Jersey without the approval of the Congress of the United States.

In order to determine the purposes for which the respondent was created by the Legislatures of the States of New York and New Jersey, as approved by the Congress of the United States, it becomes necessary to refer to Article I of this Waterfront Commission Compact.

Article I which is headed "Findings and Declarations" and is therefore to be considered a preamble to the Act and

indicates beyond all doubt the intent of the Legislatures of the States of New York and New Jersey and that of Congress, in approving the same, reads as follows:

> "1. The states of New York and New Jersey hereby find and declare that the conditions under which waterfront labor is employed within the port of New York district are depressing and degrading to such labor, resulting from the lack of any systematic method of hiring, the lack of adequate information as to the availability of employment, corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character and integrity and neither responsive or responsible to the employers nor to the uncoerced will of the majority of the members of the labor organizations of the employees; that as a result waterfront laborers suffer from irregularity of employment, fear and insecurity, inadequate earnings, an unduly high accident rate, subjection to borrowing at usurious rates of interest, exploitation and extortion as the price of securing employment and a loss of respect for the law; that not only does there result a destruction of the dignity of an important segment of American labor, but a direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessaries handled in and through the port of New York districts."

It is conclusive that the Legislatures of the States of New York and New Jersey in passing this compact and Congress' approval of the compact, intended to deal solely and entirely with the conditions under which waterfront labor was working.

Article I sets forth a lack of any systematic system of hiring, the lack of adequate information as to the availabil-

ity of employment, corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character and integrity, neither responsive nor responsible to the employers nor to the uncoerced will of the majority of the members of the labor organization and employees.

It might be noted that the hiring agents are the employees of the steamship companies and are not members of the labor organization.

Nowheres is there included in this Article I the term "labor organization".

If it were the intent of the Legislatures of the States of New York and New Jersey and the Congress of the United States in approving this Compact, to include the labor organization in Article I, the preamble to the Compact which shows the purposes for which the Compact was created, the Waterfront Commission Compact, would have included the labor organization. Surely this was not an oversight on the part of the Legislatures of the States of New York and New Jersey, and the Congress of the United States, in approving the Waterfront Commission Compact. Is this Court prepared to say that three separate and distinct legislative bodies could have or would have deliberately overlooked the labor organization in failing to include the labor organization in Article I of the Waterfront Commission Compact? After all the New York State Legislature meets in Albany, New York. The Legislature of the State of New Jersey meets in Trenton, New Jersey. The Congress of the United States meets in Washington, D. C. It therefore follows that this Waterfront Commission Compact had to be submitted at three different points of

travel to three different Legislatures and all three Legislatures did not mention the labor organization in Article I of the Waterfront Commission Compact. This shows beyond all doubt that the intent of the Legislatures of the States of New York and New Jersey and the Congress of the United States in approving this Waterfront Commission Compact was not to deal with the labor organization as such, but merely to deal with and try to better the lot of the waterfront laborer as such, and only and strictly in that capacity.

82 C. J. S. Statutes, Section 323, at page 612, states as follows:

"DECLARATION OF PURPOSE"

> "When the purpose of an Act is expressed in clear and unambiguous terms, this must be accepted as the solemn declaration of the sovereign and be taken as true, unless incompatible within the meaning and effect of the statute. Accordingly, the legislative declaration of purpose and policy is entitled to the gravest consideration unless overthrown by facts of record and a statute will, if possible, be given a construction which is consistent with its declared purpose. Ordinarily, where the law making power distinctly states its design, no place is left for construction."

The Legislatures of the States of New York and New Jersey and the Congress of the United States, in giving its approval to this Waterfront Commission Compact, stated clearly and concisely the purposes of the Act and the intent of the Legislatures in Article I of the Waterfront Commission Compact, and there is therefore nothing left for construction by a court.

The Congress of the United States in approving Part One of the Waterfront Commission Compact, empowered the States of New York and New Jersey to pass any law which would implement the purposes for which the Waterfront Commission of New York Harbor was created but the Congress of the United States reserved to itself the right to alter, amend or repeal this Act.

Article XVI of the Laws of Congress, Chapter 407, reads as follows:

"1. Amendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the Legislature of either State concurred in by the Legislature of the other.

2. If any part or provision of this compact or the application thereof to any person or circumstances be adjudged invalid by any court of competent jurisdiction, such judgment shall be confined in its operation to be the part, provision or application directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this compact or the application thereof to other persons or circumstances and the two States hereby declare that they would have entered into this compact or the remainder thereof had the invalidity of such provision or application thereof been apparent.

3. In accordance with the ordinary rules for construction of interstate compacts this compact shall be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof.

4. This compact shall be known and may be cited as the 'Waterfront Commission Compact.'

Sec. 2. The right to alter, amend or repeal this Act is hereby expressly reserved. (Italics mine)

Approved August 12, 1953."

At the time that the States of New York and New Jersey passed the Waterfront Commission Compact, Part I, only of that Compact was submitted to the Congress of the United States for approval.

While Section 8 of the Waterfront Commission Act was passed at the same time that the Compact was passed by both states, Section 8 was by law not to become effective until September 1, 1953.

That portion of the Compact of the Waterfront Commission Compact that was submitted to the Congress of the United States for approval, was approved by the Congress of the United States on August 12, 1953. Section 8 of the Waterfront Commission Act did not become a law until after Congress had approved the Compact between the States of New York and New Jersey. Section 8 of the Waterfront Commission Act was never submitted to the Congress of the United States for its approval.

In other words, even though Congress approved of the Waterfront Commission Compact on August 12, 1953, one could collect dues even though there may have been known murderers and known racketeers, as officers and agents of the labor organization. There was no criminal violation until September 1, 1953, imposed upon the individual who merely collected dues.

Section 8 of the Waterfront Commission Act does not place the violation of law on the felon but rather on the

individual who may collect the dues for the labor organization.

Surely Section 8 cannot be considered to be a section to implement the purposes for which the Compact had been created because reference has only to be made again to Article I of the Waterfront Commission Compact which discloses surely the intent of the Legislatures of the States of New York and New Jersey in passing this Compact and in Congress' approving the Compact. As a matter of fact, Article II of the Waterfront Commission Compact as approved by the Congress of the United States, contains some eighteen definitions, and nowheres is there to be found the words "labor organization".

Surely if the Legislature of the State of New York, located in Albany, New York, and the Legislature of the State of New Jersey, located in Trenton, New Jersey, and the Congress of the United States, located in Washington, D. C., intended to include the labor organization among the definitions contained in Article II, it would have done so. It was not a pure oversight. It was deliberately intended that the labor organization as such be excluded from the Waterfront Commission Compact.

Article II of the Waterfront Commission Compact defines: 1. The Port of New York District; 2. Commission; 3. Pier; 4. Other waterfront terminal; 5. Person; 6. Carrier or freight by water; 7. waterborne freight; 8. Longshoremen; 9. Checker; 10. Pier Superintendent; 11. Port watchman; 12. Longshoremen's register; 13. Stevedore; 14. Stevedore which also include contractors for a compensation pursuant to a contract or area within the United

States or any state or territory thereof; 15. Hiring agent; 16. Compact; 17. Court of the United States; 18. Witness.

It is easy to conceive that if the Legislature of the State of New York meeting in Albany, New York, and the Legislature of the State of New Jersey meeting in Trenton, New Jersey, and the Congress of the United States meeting in Washington, D. C., intended to include the labor organization in the Waterfront Commission Compact and thereby give jurisdiction to the Waterfront Commission of New York Harbor over the labor organization, the term "labor organization" would have been included in Article II of the Waterfront Commission Compact.

It is to be noted that by virtue of the fact that great pain and caution was taken to enumerate the persons and the geographic locations in Article II of the Waterfront Commission Compact, and by virtue of which the Waterfront Commission of New York Harbor has jurisdiction solely and only over these people defined in Article II of the Compact, that three Legislatures could not have deliberately and/or negligently failed to embody in the Compact the term "labor organization" in Article II of the Waterfront Commission Compact if the Legislatures intended that the Waterfront Commission of New York Harbor have jurisdiction over the labor organization.

How possibly can jurisdiction by the Waterfront Commission of New York Harbor over the labor organization provide adequate information as to the availability of employment when the hiring agents are the employees of the steamship companies, and how can jurisdiction over the labor organization by the Waterfront Commission of New

York Harbor do away with corrupt hiring practices and the fact that persons doing such hiring are frequently criminals and notoriously lacking in moral character and integrity when the hiring agent is the employee of the steamship company?

In *Virginia v. Tennessee*, 148 U. S. 503, the Court said at page 519:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."

Section 8 is the section which enhances the political power of the States of New York and New Jersey and does encroach upon the just supremacy of the United States. Why has not Section 8 been submitted by the Legislatures of the States of New York and New Jersey to the Congress of the United States for its approval? Is it possible that the Legislatures of both states were in fear that Congress may not approve Section 8, and the States thereupon increased their political power in passing Section 8 which does not implement the purposes for which the Waterfront Commission Compact was created?

The Waterfront Commission of New York Harbor, publishing the "Waterfront Commission Act," has included therein on page 50, the following language:

> "Liberal Construction. This act * * * constitutes an agreement between the states of New York and New Jersey, supplementary to the waterfront commission compact *and amendatory thereof*, and shall

> be liberally construed to effectuate the purposes of said compact and the powers vested in the waterfront commission hereby shall be construed to be in aid of and supplemental to and not in limitation of or in derogation of any of the powers heretofore conferred upon or delegated to the waterfront commission." (Italics added.)

The above language was used and published by the Waterfront Commission of New York Harbor, and was not an enactment by the legislatures of the States of New York and New Jersey, or either, nor was it an enactment of the Congress of the United States. It is the construction placed upon the Waterfront Commission Act by the Waterfront Commission of New York Harbor.

POINT III

Section 8 of the Waterfront Commission Act violates Amendment XIV of the Constitution of the United States and by direction and/or indirection it deprives Local 824, International Longshoremen's Association (Ind.) of its right to property in the form of dues, assessments, fines, etc. without due process of law.

Section 8 prohibits the collection of any dues, assessments, levies, fines or contributions by the labor organization if any officer or agent of such organization has been convicted by a Court of the United States or any state or territory thereof, of a felony, unless he has been subsequently pardoned therefrom by the Governor or appropriate authority.

This in effect means that a Local of the labor organization is restrained from collecting any moneys whatsoever if a mere agent had been convicted of a felony in the State of California some thirty or forty years ago. It means the extinction of the labor organization.

Judicial notice might be taken of the fact that a labor organization can solely and only function by the collection of dues from its membership. To take that right away from a labor organization is to destroy that labor organization.

Amendment XIV of the Constitution of the United States and the Constitution of the State of New York provide that no state shall deprive any person of life, liberty or property without due process of law.

Yet this is precisely what the Waterfront Commission Act does and what the Waterfront Commission of New York Harbor acting pursuant to the powers vested in it by the Waterfront Commission Act are doing.

In *Cluet Peabody & Co. v. Mays, Inc.*, 5 App. Div. 2d 140, which was a case which dealt with a Fair Trade Price Agreement, the Court said at page 148:

> "The constitutional validity of a law is to be tested not by what has been done under it but by what may, by its authority, be done (*Studrt v. Palmer*, 74 N. Y. 183, 188. *People ex rel. Beck v. Graves*, 280 N. Y. 405, 410)."

The Court in that case went on further to say:

> "It seems obvious that price restrictions imposed under authority so delegated may be so arbitrary, as to have no reasonable relation to the legislative

purpose and that their enforcement by law would be repugnant to the due process clauses of the Federal Constitution (U. S. Constitution, XIV Amendment, Sec. 1) and those of our own Constitution (New York Constitution, Article I, Section 6) which guarantee due process and which vest the legislative power of the State in the Senate *and* the Assembly (New York Constitution, Article III, Sec. 1);" (Citations omitted)

It is submitted that Section 8 is repugnant to the Due Process Clauses of the Federal and State Constitutions in that its enforcement by law would destroy the labor organization and not help to achieve the purposes for which the Waterfront Commission Compact was created.

POINT IV

Section 8 of the Waterfront Commission Act violates Amendment XIV of the Constitution of the United States and the Constitution of the State of New York, Article I, Section 6, Subdivision 3, in that it imposes upon a prospective violator of the Act an obligation in ascertaining the criminal history or lack of it of each and every officer and agent of the Union which goes beyond the scope of reasonableness and therefore deprives a prospective violator of his liberty without due process of law.

Judicial notice may be taken of the fact that there are approximately four hundred law enforcing agencies in our country, and that besides law enforcing agencies in many of our territories.

Judicial notice might also be taken of the fact that police files are confidential.

Judicial notice might also be taken of the fact that files of the Federal Bureau of Investigation are confidential.

Assuming that I were elected an officer of this Union, how would I be able to determine whether any other officer or agent of the Union has a criminal history? If I went to the Federal Bureau of Investigation to make inquiries I would be told that their files are confidential and not open to public inspection and the same would hold true with the local Police Department.

Yet, if I collected dues and if it later developed that an officer or an agent had been convicted of a felony in any court of the United States or in any state or in any territory, I would be guilty of a misdemeanor.

Section 8 does not provide for the wilful collection of dues, nor does it provide for the collection of dues with knowledge that an officer or agent has been convicted of a felony, but it merely provides that if one collects dues while an officer or agent had been guilty of a felony in any state or territory or court of the United States, he shall be guilty of a misdemeanor.

POINT V

Section 8 of the Waterfront Commission Act violates Article I, Section 8, Clause 3 and Article 6, Clause 2 of the Constitution of the United States in that Congress has by the National Labor Relations Act and the Taft Hartley Act occupied a given area in industrial relations and the said Section 8 of the Waterfront Commission Act is diametrically opposed and in direct conflict with the laws of Congress as aforesaid.

Judicial notice should be taken of the fact that the United States Government has entered the area of dealing with officers of Unions. National legislation has been passed which requires an officer of a union to execute a non-Communist affidavit.

Section 9(h) of the National Labor Relations Act provides as follows:

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under Subsection (c) of this Section, and no complaint shall be issued pursuant to a charge made by a labor organization under Subsection (b) of Section 10 unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve month period by each officer of such labor organization that he is not a member of the Communist Party or affiliated with such party, and he does not believe in and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by

force or by any illegal or unconstitutional methods. . . ."

29 U. S. C. A. Sec. 159(h).

The Congress of the United States by enacting this legislation has entered the field of dealing with officers of labor organizations. The sole restriction that the Congress of the United States has placed on a labor organization is that no officer shall be a member of the Communist Party, support, believe in its tenets and belong to any organization that has as its purpose the overthrow of this Government.

The States of New York and New Jersey have entered this area which the Congress of the United States has reserved to itself and the passage of Section 8 of the Waterfront Commission Act without the approval of the Congress of the United States, violates it.

In the case of *International Union, etc.* v. *O'Brien*, 339 U. S. 454, which was an appeal by a union from a decision of the Supreme Court in Michigan, which upheld a state statute which required a strike vote by a majority within 20 days (Fed. 60 day notification) of the strike, which statute was declared unconstitutional. The Court stated at page 458:

> "Even if some state legislation in this area could be sustained the particular statute before us could not stand. For it conflicts with the Federal Act. Without question the Michigan provision conflicts with the exercise of federally protected rights. A state statute so at war with Federal law cannot survive." (Citations omitted)

Further at page 459, the Court said:

> "Congress has protected the Union conduct which the state has forbidden . . . the state legislature must yield. That principle is controlling here."

Section 7 of the National Labor Relations Act safeguards the right to strike.

See also *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383; *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767.

Congress having already entered and occupied the area dealing with officers of unions, by making it mandatory for an officer of a union to execute a non-Communist affidavit, it is submitted that the jurisdiction now remains only with Congress to determine whether officers or agents of unions may or may not have felony convictions.

Congress has already imposed a restriction on officers of a union.

The state may not take it upon itself to enter that area and impose further restrictions without submitting those restrictions to the Congress of the United States for its approval.

Section 8 of the Waterfront Commission Act has in effect imposed on officers of the union a restriction not to have a felony conviction regardless of when that felony conviction may have been obtained. Surely if the Congress of the United States in effect has entered the area of dealing with limitations of the qualifications of holding an office in a union, a state may not enter that area without the consent of the Congress of the United States.

POINT VI

Section 8 of the Waterfront Commission Act violates Section 17 of Article I of the Constitution of the State of New York (Bill of Rights) in that by direction and/or indirection Section 8 of the Waterfront Commission Act denies to the members of Local 824, International Longshoremen's Association (Ind.) the right to choose their own collective bargaining representatives which inhibits and restrains the right to bargain collectively with respect to the proper and lawful goals and benefits of the labor organization.

Section 17 of Article I of the Constitution of the State of New York (Bill of Rights), provides:

> "Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed.
>
> * * * * *
>
> Employees shall have the right to organize and to bargain collectively through representatives of their own choosing. Adopted by Constitutional Convention of 1938; approved by the People, November 8, 1938."

In the case of *Quill, et al.* v. *Eisenhower*, 113 N. Y. S. 2d 887, which was a motion made by the Transport Workers Union of America against the trustees of Columbia University, to compel the University to bargain collectively with the Union, Mr. Justice Botein, in his opinion, stated at page 889:

> "The constitutional provision was intended to protect employees against legislation or acts which

would prevent or interfere with their organization and choice of representatives for the purpose of collective bargaining."

Section 7 of the National Labor Relations Act provides as follows:

> "Employees shall have the right to self organization, to form, join, or assist labor organization, to *bargain collectively through representatives of their own choosing,* and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)." (Italics supplied)
>
> 29 U. S. C. A. sec. 157.

The Congress of the United States in approving the Waterfront Commission Compact, recognized that Section 7 of the National Labor Relation Act gives to members of a union the right to select representatives of their own choosing approved Article XV of the Waterfront Commission Compact, which reads as follows:

> "1. This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to bargain collectively and to act in any other way individually, collectively, and through labor orzanizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike."

The States of New York and New Jersey, in violation of the very Article XV which had been approved by the Congress of the United States, also passed Section 8, which section was never submitted to the Congress of the United States for its approval.

Section 8 limits collective bargaining and does not safeguard collective bargaining.

A situation may be conceived of where a man may have been convicted of a felony some thirty or forty years ago, readjusted and rehabilitated himself, and belongs to the labor organization and has worked tirelessly to build up the labor organization and the members having confidence in that individual, would want to select him as their bargaining agent. Yet the States of New York and New Jersey, without the approval of the Congress of the United States, have decided that that individual may not be the agent for collective bargaining for the members of the union.

Was that the intent of the Congress of the United States in approving Article XV, in safeguarding collective bargaining?

Is it not in conflict with Section 7 of the National Labor Relations Act which area the United States Government has entered and occupied?

The State Constitution protects collective bargaining. Does not Section 8 of the Waterfront Commission Act violate the National Labor Relations Act and the State Constitution? There can be but one answer and that is that it does.

POINT VII

Even though the petitioner Local 824 has already submitted to the Waterfront Commission of New York Harbor all of its books and records in accordance with the subpoenas served, and even though John Bowers, petitioner, an officer of Local 824 also has been questioned, the constitutionality of Section 8 has not become moot and academic.

In the case of *Matter of Rosenbluth* v. *Finkelstein*, 300 N. Y. 402, a proceeding was brought by a landlord to recover an apartment from the respondent on the grounds of personal need in good faith. The Rent Commission of the City of New York denied the certificate of eviction, and the Landlord appealed from such denial whereupon the Appellate Division reversed and the Tenant appealed. The Court considered whether the question had become moot and academic, and if so, whether the Court should hear and entertain it. Judge Fuld in writing the opinion of the Court of Appeals of the State of New York in this case, at page 404 stated as follows:

> "Although the appeal has become moot and academic, we refrain from dismissing it because of the importance of the issue presented. Affecting as it does the administration of the emergency housing legislation in the City of New York, the question is one of major importance and, because it will arise again and again, one that invites immediate decision. (See e.g. *Matter of Glenram Wine & Liquor Corp.* v. *O'Connell*, 295 N. Y. 336, 340; *Matter of Lyon Co.* v. *Morris*, 261 N. Y. 497, 499)."

In the case of *Glenram Wine & Liquor Corp.* v. *O'Connell*, *supra*, which was a case where the New York State Liquor Authority had found that the petitioner-respondent had sold liquor above prices set by the Office of Price Administration and failed to keep accurate books and records and the Administrator therefor cancelled the license, on the question as to whether that was moot or not, the Court of Appeals of the State of New York at page 340, had this to say:

> "We think the questions presented on this appeal are of importance in the administration of the Alcoholic Beverage Control Law and in the future conduct of the business of respondent and other licensees under said law. Accordingly, we reject the suggestion that the appeal should be dismissed as moot. (*Matter of Lyon Co.* v. *Morris*, *supra*)"

The principles in the law enunciated by the Court of Appeals should be followed by this Honorable Court. The Court of Appeals of the State of New York has declared, as has been pointed out, that where the situation may arise over and over again, that the Court should pass upon the constitutionality of a New York State Statute.

In the event that this Honorable Court should not agree with the reasoning of the Court of Appeals of the State of New York, with respect to a situation that may arise again and again, as is present in the instant situation, then this Honorable Court will merely subject the petitioners to a possible harassment on the part of the Waterfront Commission of New York Harbor, and subject the petitioners to the service of subpoenas at the whim and pleasure of the Waterfront Commission of New York Harbor.

By the Waterfront Commission of New York Harbor using the language "this Act • • • constitutes an agreement between the States of New York and New Jersey supplementary to the Waterfront Commission Compact and amendatory thereto • • • ", should be a clear indication that the Waterfront Commission of New York Harbor has conceded that Section 8 is an amendment to the Waterfront Commission Compact, and by such concession Section 8 should have been submitted to the Congress of the United States for its approval in accordance with Article XVI of the Laws of Congress, Chapter 407, for while supplementary and amendatory to the Compact it does not implement the purposes of the compact.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY A. LOWENBERG
Attorney for Petitioners

APPENDIX A

Order of Special Term Entered on the Order and Judgment of the Court of Appeals

At a Special Term, Part II, of the Supreme Court, New York County, held in and for the County of New York, at 60 Centre Street, in the City of New York, State of New York, on the 16th day of July, 1959.

Present:

HON. FREDERICK BACKER

Justice

Index Nos. 11650/58, 11987/58

In the Matter of LOCAL 824, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (Ind.),

Petitioner,

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

Index No. 11988/58

In the Matter of JOHN BOWERS,

Petitioner.

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

Appendix A

The above-named petitioners having appealed to the Court of Appeals of the State of New York from the orders of the Appellate Division of the Supreme Court, First Department, in the Office of the Clerk of the County of New York, on the 19th day of November, 1958, affirming the orders in favor of the respondent herein against the petitioners, heretofore entered in the office of said Clerk, on the 24th day of September, 1958, denying motions (1) by Local 824 of the International Longshoremen's Association to quash a subpoena duces tecum served upon it by service upon Patrick J. Connolly, President of Local 824 and requesting the production at the Waterfront Commission offices of books and records specified therein; (2) by Local 824 of the International Longshoremen's Association to quash a subpoena duces tecum served upon it by service upon John Bowers, Vice President and Business Agent of Local 824 and requesting the production at the Waterfront Commission offices of books and records specified therein, and (3) by John Bowers to quash a subpoena served upon him individually and requesting his testimony at the offices of the Waterfront Commission, and from each and every part of said orders of affirmance as well as from the whole thereof; and the said appeal having been duly argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said appeal from the aforesaid orders be dismissed without costs, upon the ground that the asserted constitutional questions are not directly involved in the decision appealed from [C. P. A., 588 Subd. 1(a)]

and having ordered and adjudged that the proceedings therein be remitted to this Supreme Court and to be proceeded upon according to law;

Now, upon reading and filing the remittitur from the said Court of Appeals, and upon motion of William P. Sirignano, attorney for the respondent herein, it is hereby

ORDERED, that the order and judgment of said Court of Appeals be and the same hereby are, made the order and judgment of this Court.

Enter.

FREDERICK BACKER
J. S. C.

APPENDIX B

Dissenting Opinion of Judge Froessel of the Court of Appeals of the State of New York, Concurring Judge Van Voorhis

In the Matter of Local 824, International Longshoremen's Association (Ind.), Appellant, against Waterfront Commission of New York Harbor, Respondent.

In the Matter of John Bowers, Appellant, against Waterfront Commission of New York Harbor, Respondent.

Decided May 29, 1959.

Appeals dismissed, without costs, upon the ground that the asserted constitutional questions are not directly involved in the decision appealed from (Civ. Prac. Act, § 588, subd. 1, par. [a]).

Concur: Chief Judge Conway and Judges Desmond, Dye, Fuld and Burke. Judge Froessel dissents in the following opinion in which Judge Van Voorhis concurs:

Froessel, J. (dissenting). I do not think we should dismiss this appeal on the ground that the subpoenas were effective whether or not section 8 of the Waterfront Commission Act is constitutional, and that hence a constitutional question is not directly involved. Whether or not the commission *had to* rely upon section 8 to issue these subpoenas, the fact is that it *did so rely* upon section 8, and the very purpose of the investigation was to determine "whether the aforesaid Section 8 of the Waterfront Commission Act was being violated". The affidavit of the of-

ficial who authorized the investigation relied squarely on section 8 as authority for invoking the broad investigatory powers of the commission. He stated that section 8 was enacted "in order to eliminate some of the evil conditions on the waterfront", and that "In order to execute the mandate of the Waterfront Commission Act that it eliminate the evil conditions to have existed on the waterfront, the Waterfront Commission is clothed with broad investigatory powers".

If section 8 is unconstitutional, then it seems to me that the subpoenas issued to determine whether section 8 was being violated must also fall. I do not think the investigating powers of the commission can be justified out of the context of the particular evil being investigated. These powers were conferred to aid in the elimination of particular evils, and their exercise must be judged in the context of the particular evil being investigated. Here, the powers were invoked specifically to determine whether section 8 was being violated, and if section 8 is invalid, there is no basis to support the particular exercise of the investigatory powers. If section 8 falls so must the subpoenas fall, and hence I feel that a constitutional question is directly involved.

The motion to dismiss the appeal should be denied.

Appeals dismissed, etc.

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No. 275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

In the Matter of LOCAL 824, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (IND.),

Petitioner,

against

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

In the Matter of JOHN BOWERS,

Petitioner,

against

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM P. SIRIGNANO
Director of Law and Enforcement
of the Waterfront Commission
of New York Harbor
Counsel for Respondent
15 Park Row
New York 38, New York

Of Counsel:

HAROLD N. McGOWAN
Assistant Director of Law
and Enforcement

IRVING MALCHMAN
Assistant Counsel

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IN THE

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OCTOBER TERM, 1959

No. 275

In the Matter of LOCAL 824, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (IND.),

against

WATERFRONT COMMISSION OF NEW YORK HARBOR,

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In the Matter of JOHN BOWERS,

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The Court of Appeals of the State of New York, the Court below, did not render an opinion herein. Rather, the Court of Appeals dismissed without opinion the appeals of petitioners on the ground that the constitutional ques-

tions asserted by petitioners were not directly involved in the decision appealed to the Court of Appeals and that, consequently, under the provisions of Section 588(1)(a) of the New York Civil Practice Act, there was no jurisdiction over the appeal (Petition, App. B, pp. 49-50).

Jurisdiction

The petition does not set forth a statement of the grounds on which the jurisdiction of this Court is invoked. Presumably, however, the jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1257(3).

With respect to the question of jurisdiction, it is respondent's position that this case is moot since the within subpoenas have been complied with and are no longer in force.

Moreover, it is respondent's position that petitioners have failed to obtain a judgment by the highest court of the state in which decision could be had, as required by Title 28 U.S.C., Section 1257.

Questions Presented

1. Where the subpoenas of the Waterfront Commission have been complied with and consequently are no longer in force and effect, whether the motions to quash such subpoenas have become moot.

2. Where petitioners' appeals to the Court of Appeals of the State of New York were dismissed as improperly taken because the decision appealed from did not directly involve the asserted constitutional questions and where petitioners could, but did not, apply for permission to appeal, whether petitioners have obtained a judgment by the highest court of the state in which decision could be had, as required by Section 1257 of Title 28.

3. Where subpoenas are issued by the Waterfront Commission in connection with an administrative investigation and where there are at least three explicit statutory grounds for such investigation, only one of which was related to Section 8 of the Waterfront Commission Act, whether such subpoenas should be quashed on the ground of the alleged unconstitutionality of Section 8 upon motion by persons who are only witnesses in the investigation.

4. Whether Section 8 of the Waterfront Commission Act is constitutional.

Statute Involved

The statutory provisions involved herein are embodied in the Waterfront Commission Act which was enacted by the States of New York and New Jersey in 1953 (N. Y. Laws 1953, c. 882 (McK. Unconsol. Laws 6700aa and following); (N. J. Laws 1953, c. 202 (N.J.S.A., 32:23-1 and following)) for the purpose of eliminating various evils on the waterfront of New York Harbor, which had been publicly exposed by various investigative bodies. Since Part I of the Act encompasses the Waterfront Commission Compact, an interstate compact between the States of New York and New Jersey, Part I of the Act was submitted to and approved by Congress (Act of August 12, 1953, c. 407, 67 Stat. 541).

Article IV, Part I, of the Waterfront Commission Act, relating to the powers of the Waterfront Commission, provides as follows:

> "In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:
>
> • • •
>
> "8. By its members and its properly designated officer, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the

attendance of witnesses and the giving of testimony and the production of other evidence.

* * *

"11. To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objectives of this compact;

* * *

"13. To make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district, for the alleviation of the evils described in article 1 and for the effectuation of the purposes of this compact.

"14. To cooperate with and receive from any department, division, bureau, board, commission, or agency of either or both states, or of any county or municipality thereof, such assistance and data as will enable it properly to carry out its powers and duties hereunder, and to request any such department, division, bureau, board, commission, or agency, with the consent thereof, to execute such of its functions and powers, as the public interest may require." (McK. Unconsol. Laws 6700dd; N.J.S.A. 32:23-10)

"Witness" is defined under Section 5-a(4) of the Act as "* * * any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act." (Mck. Unconsol. Laws 6700tt-1; N.J.S.A. 32:23-85)

In addition the legislature of New York enacted Section 8 of the Waterfront Commission Act, which provides:

"Collection of funds for unions having officers or agents who are felons. No person shall solicit, collect

or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned therefor by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability.

"As used in this section, the term 'labor organization' shall mean and include any organization which exists and is constituted for the purpose in whole or in part of collective barganing, or of dealing with employers concerning grievances, terms and conditions of employment, or of other mutual aid or protection; but it shall not include a federation or congress of labor organizations organized on a national or international basis even though one of its constituent labor organizations may represent persons so registered or licensed." (McK. Unconsol. Laws 6700ww)

Section 8 of the Waterfront Commission Act passed by New Jersey differs in certain respects from the New York law. For example, the New Jersey Section 8 is applicable to officers or agents convicted of a "high misdemeanor or misdemeanor involving moral turpitude", as well as a "felony". (N.J.S.A. 32:23-80)

Section 1, Article XVI, Part I, of the Act provides as follows:

"Amendments and supplements to this compact to implement the purposes thereof may be adopted by the action of the legislature of either state concurred in by the legislature of the other." (McK. Unconsol. Laws 6700pp; N.J.S.A. 32:23-70)

Statement

This proceeding involves motions by (1) Local 824 of the International Longshoremen's Association to quash a subpoena duces tecum served upon it by service upon Patrick J. Connolly, President of Local 824, and requesting the production at the Waterfront Commission offices of books and records specified therein; (2) by Local 824 of the International Longshoremen's Association to quash a subpoena duces tecum served upon it by service upon John Bowers, Vice President and Business Agent of Local 824, and requesting the production at the Waterfront Commission offices of books and records specified therein; and (3) by John Bowers to quash a subpoena served upon him individually and requesting his testimony at the offices of the Waterfront Commission (R. 15-24, 42-51, 52-60).

In the summer of 1958, the Waterfront Commission received information that certain notorious waterfront hoodlums with serious criminal records, including felony convictions, had resumed their association with Local 824 and were receiving substantial annual payments of money from Local 824 (R. 25-30). The Commission instituted an investigation in order to ascertain the facts concerning these matters and ultimately, in connection with such investigation, served the within subpoena and subpoenas duces tecum (hereinafter sometimes collectively called "subpoenas").

Petitioners moved to quash the subpoenas, which motions were denied by the Supreme Court of the State of New York on September 24, 1958 (R. 9-14, 63-68). Petitioners appealed to the Appellate Division, First Department, which on November 19, 1958, unanimously affirmed, without opinion, the Supreme Court (R. 77-82).

Petitioners then appealed to the Court of Appeals and applied to Judge Fuld of the Court of Appeals for a stay of the subpoenas pending the appeal. Judge Fuld

denied this application. Thereupon, in December, 1958, the subpoenaed books and records of Local 824 were produced at the offices of the Waterfront Commission, were inspected by the Waterfront Commission, and were returned by the Waterfront Commission to Local 824. In addition, the subpoenaed officers of Local 824 testified at the offices of the Waterfront Commission. Consequently, the subpoena and subpoenas duces tecum of the Waterfront Commission herein involved have been complied with and are no longer in force and effect (See Petition, pp. 43-45).

By motion returnable February 23, 1959, the Waterfront Commission moved in the Court of Appeals to dismiss the appeals of petitioners on the ground that the appeal could not be taken as of right since the decision of the Appellae Division did not necessarily involve a constitutional question (New York Civil Practice Act. Sec. 588(1)(a)) and on the further ground that the controversy had become moot and academic. This motion was denied by the Court of Appeals with leave to renew on the argument (Petition, pp. 18-19). Subsequently, the case was argued and submitted to the Court of Appeals and the Waterfront Commission duly renewed its motion to dismiss the appeals of petitioners. On May 29, 1959, the Court of Appeals, by a vote of 4-2, dismissed the appeals of petitioners upon the ground that the asserted constitutional questions were not directly involved in the decision appealed from (Petition, App. B., pp. 49-50).

Argument

Section 8 of the Waterfront Commission Act (*supra*, pp. 4-5) prohibits the collection of funds from employees registered or licensed to work on the waterfront by the Waterfront Commission for or on behalf of unions representing such employees if any officer or agent of the union has been convicted of a felony unless such officer

or agent has been pardoned. Petitioners insist that Section 8 of the Waterfront Commission Act was the statutory predicate for the investigation involved herein, that Section 8 is unconstitutional, and that, *ergo*, the within subpoenas should have been quashed. These contentions are untenable.

First, since the subpoenas have been complied with and are no longer in effect, the case is moot.

Further, petitioners have not obtained a judgment by the highest court of the state in which decision could be had, as required by Section 1257 of Title 28.

Further, the judgment of the state court rests upon independent non-constitutional grounds.

And in any event, the multiplicity of objections asserted by petitioners to the constitutionality of Section 8 are without substance.

POINT I

The controversy has become moot.

Petitioners explicitly concede that they have already complied with the within subpoenas (Petition, pp. 43-45). Notwithstanding, petitioners urge that this Court exercise its certiorari jurisdiction to decide the asserted questions as to the constitutionality of Section 8 on the ground that these questions may recur should the Waterfront Commission subpoena petitioners again. In support of their position, petitioners rely upon decisions by the New York Court of Appeals deciding questions which have become moot because of the importance of such questions and because such questions were of a recurrent nature (Petition, pp. 43-45).

Whatever may be the state law with respect to deciding controversies that have become moot (which, of course,

is not controlling here, *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U. S. 416 (1951)), it is settled that a "federal court is without power to decide moot questions or to give advisory opinions which cannot effect the rights of the litigants in the case before it". *St. Pierre* v. *United States*, 319 U. S. 41 (1943). In the *St. Pierre* case, the petitioner therein was sentenced to five months imprisonment for contempt of court for refusal to testify before a federal grand jury. Since petitioner therein had served his sentence, this Court held that the case was moot and dismissed the writ of certiorari that it had previously granted, notwithstanding the fact that the case raised important questions with respect to the constitutional immunity from self-incrimination, notwithstanding the further fact that the Government admitted that the petitioner therein would be required to testify again before the grand jury and that, in the event of petitioner's refusal to testify, his committal would be sought again, and notwithstanding petitioner's contention that his conviction for contempt may impair his credibility as a witness in any future legal proceeding. Thus, that this proceeding is moot appears *a fortiori* from this Court's decision in *St. Pierre*.

POINT II

Petitioners have failed to obtain a judgment by the highest court of the state in which decision could be had, as required by Section 1257 of Title 28.

Section 1257 of Title 28, U.S.C., confers jurisdiction upon this Court to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had". In this case, petitioners have failed to obtain a judgment or decree by the highest court of the state, as required by Section 1257.

As noted, the Court of Appeals dismissed petitioners' appeals upon the ground that the asserted constitutional

questions were not directly involved in the decision appealed from and that, therefore, there was no jurisdiction over the appeal under the provisions of Section 588(1)(a) of the New York Civil Practice Act (Petition, App. B, pp. 49-50). However, an appeal by permission was available to petitioners in the first instance by moving for such permission (1) in the Court of Appeals, or (2) in the Appellate Division, or (3) in the Court of Appeals after such permission had been denied by the Appellate Division (New York Civil Practice Act, Section 589 (3)). Further, after dismissal of their appeals by the Court of Appeals, petitioners still had the right to appeal by permission to the Court of Appeals by moving for such permission (1) in the Court of Appeals, or (2) in the Appellate Division, or (3) in the Court of Appeals after refusal of such permission by the Appellate Division (New York Civil Practice Act, Section 592(3)(b)). Petitioners, however, did not move for permission to appeal at any time, either before or after the dismissal of their appeals by the Court of Appeals.

Hence, it is clear that petitioners have not obtained a judgment or decree "by the highest court of a State in which a decision could be had", which alone is reviewable by this Court under Section 1257. The dismissal of petitioners' appeals is of course not the equivalent of an affirmance on the merits by the Court of Appeals; rather, petitioners' appeals were dismissed because under well settled principles they failed in "the burden [upon appellants] of presenting to us [the Court of Appeals] a record which establishes that such construction [presenting the constitutional question] has not only directly but necessarily been involved in the decision of the case. If the decision was or may have been based upon some other ground, the appeal will not lie." *Matter of Haydorn* v. *Carroll*, 225 N. Y. 84, 88 (1918). Consequently, the writ of certiorari is not available to petitioners. *McMaster* v. *Gould*, 276 U. S. 284 (1928).

POINT III

The judgment of the state court rests upon independent non-constitutional grounds.

As was held by the Court of Appeals, the judgment herein rests upon independent non-constitutional grounds.

The Commission, as stated, had instituted the investigation involved herein because of information received by the Commission that certain notorious waterfront hoodlums with serious criminal records, including felony convictions, have resumed their association with Local 824 and were receiving substantial annual payments of money from Local 824 (R. 25-30). The Waterfront Commission is invested with broad statutory powers of investigation and there were several explicit statutory bases for such an investigation. Thus, that notorious hoodlums and felons may be in control of waterfront labor unions was a matter unquestionably within the ambit of the statutory provision empowering the Commission "to make investigations, collect and compile information concerning waterfront practices generally" (Article IV, Section 11; *supra*, p. 4). It was also unquestionably a matter concerning which the Commission may have properly deemed it advisable "[t]o make annual and other reports to the governors and legislatures of both states containing recommendations for the improvement of the conditions of waterfront labor within the port of New York district" (Article IV, Section 13; *supra*, p. 4). In addition, the Commission was also seeking to ascertain whether Section 8 of the Act, one of the statutory remedies designed to eliminate evil conditions on the waterfront, was being violated (R. 30). Such possible violations of Section 8 were a matter concerning which the Commission may have properly deemed it advisable "to request [a state] * * * agency, with the

consent thereof, to execute such functions and powers, as the public interest may require" (Article IV, Section 14; *supra*, p. 4).

Only the last of these several statutory provisions which authorized such investigation was related to Section 8 of the Waterfront Commission Act in that any evidence of violations of Section 8 would be forwarded by the Waterfront Commission to the appropriate prosecuting office. Accordingly, there was ample statutory authority for such investigation entirely apart from Section 8 of the Waterfront Commission Act. This being so, it followed, of course, that there was no need for the state courts to pass on the constitutionality of Section 8. *Schieffelin* v. *Goldsmith*, 253 N. Y. 243, 250 (1930).

Further, and entirely independent of the foregoing, the constitutionality of Section 8 was not subject to collateral attack by petitioners. The only proceeding that affected petitioners, in any way whatever was an investigation. What that investigation would disclose and how it would affect petitioners, if at all, was unknown. Thus, petitioners had no legitimate concern at the investigative stage with the constitutional validity of Section 8. Indeed, this Court, itself, has squarely held that a witness in an investigation may not collaterally attack the constitutionality of the statute constituting the subject matter of the investigation. *Howat* v. *State of Kansas*, 258 U. S. 181, 184-186 (1922) (witness in administrative investigation under act providing for compulsory arbitration could not refuse to testify on ground of alleged unconstitutionality of act); *Blair* v. *United States*, 250 U. S. 273 (1919) (witnesses before federal grand jury investigating violations of Federal Corrupt Practices Act could not refuse to testify on ground of alleged unconstitutionality of Act).

It is therefore apparent that there are independent, non-constitutional grounds for the judgment of the state court sought to be reviewed herein by petitioners. Ordinarily,

it would be sufficient to preclude review by this Court if these non-constitutional grounds were substantial. *Lawrence* v. *State Tax Commission of Mississippi*, 286 U. S. 276, 282 (1932). We recognize, though, that questions concerning the construction of an interstate compact are themselves questions reviewable by this Court, *Petty* v. *Tennessee-Missouri Bridge Commission*, 358 U. S. 811 (1959), and that this may possible include the non-constitutional grounds upon which the judgment of the state court herein rests. However, it is manifest, we respectfully submit, that the non-constitutional grounds upon which the judgment herein rests are not only substantial but are entirely correct.

POINT IV

In any event, the multiplicity of objections asserted by petitioners to the constitutionality of Section 8 of the Waterfront Commission Act are without merit.

Petitioners make a blunderbuss attack upon the constitutionality of Section 8 of the Waterfront Commission Act, asserting a multiplicity of contentions for the invalidity of Section 8. These numerous contentions are considered below *seriatim*—as well as briefly, since they are without substance and so as not to unduly extend this brief.

1. Petitioners contend that Article XVI of the Waterfront Commission Compact provides that the states by concurrent action may enact amendments and supplements to the Compact to implement the purposes thereof (*supra*, p. 5) and apparently that Section 8 is an amendment to the Compact which is invalid because it was enacted without the consent of Congress and because it is contrary to, rather than being in implementation of, the purposes of the Compact (Petition, pp. 24-33). Petitioners' basic error is their assumption that Section 8 constitutes an amendment to the Compact, and petitioners' entire argument falls therewith.

The Waterfront Commission Act enacted by New York and New Jersey in 1953 contains three parts (New York Laws 1953, c. 882; New Jersey Laws 1953, c. 202). Part I, consisting of Section 1, contains sixteen articles [Arts. I-XVI], and encompasses a Waterfront Commission Compact between the states of New York and New Jersey. Since this part of the Act embodied a compact between states, Congressional approval was necessary under Article I, Section 10 of the Constitution of the United States, and such approval was granted by Congress on August 12, 1953 (67 Stat. 541).

Part II of the Waterfront Commission Act consists of Sections 2 through 5 and relates to such matters as expenses of administration, pensions and leaves of absence, penalties and federal funds. Under Section 12 of the Waterfront Commission Act passed by New York, Sections 1 through 5 (parts I and II) became effective upon enactment of identical legislation by New Jersey.

Part III of the Act consists of Sections 7 through 12 and embodies individual state statutes such as a prohibition against loitering on the waterfront (Section 7), a prohibition against the collection of funds for waterfront unions which have officers or agents who are felons (Section 8) and various technical legislative provisions. Under Section 12 of the Waterfront Commission Act passed by New York, Section 8 and Section 7 (the prohibition against loitering) became effective as individual state statutes on September 4, 1953, irrespective of the passage of similar legislation by New Jersey.

Thus, Section 8 is part of the Waterfront Commission Act, which also embodies the Waterfront Commission Compact. However, unlike the Compact whose effectiveness was contingent upon the passage of similar legislation by New Jersey and which required the consent of Congress, Section 8 became effective on a date certain irrespective of the passage of similar legislation by New Jersey. (New

Jersey did in fact enact substantially identical legislation in its Waterfront Commission Act.) Section 8 deals with the problem of corrupt waterfront labor unions in New York, a subject not covered by the Compact which primarily is a statute licensing certain waterfront companies and workers in the "port of New York district," an area which is defined by Article II of the Compact and which extends into both New York and New Jersey (McK. Unconsol. Laws, § 6700bb; N.J.S.A. 32:23-6). Thus, Section 8 is an individual state statute dealing with a waterfront problem in New York not encompassed by the Compact. In this respect, it is similar to Section 7 (prohibiting loitering on the waterfront), which also is an individual state statute enacted by New York as part of its Waterfront Commission Act to deal with a waterfront problem in New York not covered by the Compact.

In short, therefore, the Compact is joint legislation by New York and New Jersey to deal cooperatively with certain waterfront problems in an area extending into both New York and New Jersey. Section 8 passed by New York, on the other hand, is an individual state statute enacted to deal with certain waterfront problems in New York not covered by the Compact. That New Jersey enacted substantially identical legislation to deal separately with the same problem in New Jersey does not of course constitute Section 8 either an amendment to the Compact or an interstate compact requiring Congressional approval.

2. Petitioners contend that Section 8 deprives Local 824 of its property without due process of law (Petition, pp. 33-35). Petitioners did not argue this point in the Appellate Division and, as asserted by the Commission in its brief, the point therefore could not be raised in the Court of Appeals. *E. J. Eddy, Inc.* v. *Fidelity and Deposit Co.*, 265 N. Y. 276 (1934). And since the point was not properly preserved in the state courts, it may not of course be asserted before this Court.

Further, it is not entirely clear whether the attack on Section 8 is upon its face or as it may be applied. For petitioners complain that under Section 8 "a Local of the labor organization is restrained from collecting any moneys whatsoever if a mere agent had been convicted of a felony in the State of California some thirty or forty years ago" (Petition, p. 34). Certainly, this example is entirely hypothetical at this time insofar as petitioners are concerned. Moreover, Section 8 is not as inexorable as petitioners contend, for it is specifically provided therein that Section 8 does not act as a bar where the convicted officer or agent has obtained a pardon.

If petitioners' attack is on Section 8 on its face, then the invocation of the due process clause is frivolous since unquestionably Section 8 bears a substantial and reasonable relation to the elimination of a substantive evil. *Nebbia* v. *People of State of New York*, 291 U. S. 502, 525 (1934).

3. Next, petitioners contend that Section 8 prohibiting the collection of funds for waterfront unions having officers or agents who are convicted felons is violative of due process because Section 8 does not require knowledge by the person collecting the funds that such officers or agents were in fact felons (Petition, pp. 35-36).

Again, since we do not have an actual case, this contention is entirely hypothetical at this time. Petitioners assume that knowledge is not an element of the offense under Section 8; whether or not this is true must await determination by the state courts in an appropriate case. And in any event, a criminal statute is valid notwithstanding the fact that knowledge is not a necessary element of the offense. *United States* v. *Balint*, 258 U. S. 250 (1922) (sale of narcotics).

4. Petitioners further assert that Section 9(h) of the National Labor Relations Act (29 U.S.C., § 159(h)) has

pre-empted the area relating to qualifications of union officers by requiring union officers to execute a non-Communist affidavit and that, therefore, Section 8 is unconstitutional (Petition, pp. 37-39). Again, this point was not preserved by petitioners since, as stated by Commission in its brief in the Court of Appeals, the point was not argued by petitioners in the Appellate Division. In any event, with respect to the merits of this objection, we content ourselves with pointing out that there is no similarity whatsoever between the requirement of a non-Communist affidavit and a prohibition against felons in labor unions.

5. Finally, petitioners contend in Point VI in their petition for certiorari that Section 8 violates Section 17 of Article I of the Constitution of the State of New York in that it denies to members of Local 824 the right to choose their own collective bargaining representatives (Petition, pp. 40-42). This of course is not a federal question reviewable by this Court.

Petitioners do advert to an alleged conflict between Section 7 of the National Labor Relations Act (29 U.S.C., § 157), providing that employees shall have the right to bargain collectively through representatives of their own choosing, and Section 8 of the Waterfront Commission Act. It is not clear, however, whether this is asserted as an independent ground for the invalidity of Section 8 or to buttress petitioners' argument that Section 8 violates Section 17 of Article I of the Constitution of the State of New York. Point VI in the petition for certiorari is identical with the corresponding point in petitioners' brief in the Court of Appeals. Consequently, as "it is well settled in this Court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon", *New Central & H. R. R. Co.* v. *New York*, 186 U. S. 269, 273 (1902), petitioners have not properly preserved the federal question involving Section 7 of National Labor Relations Act, assuming that

they do in fact claim a conflict with Section 8 of the Waterfront Commission Act.

The contention in any event is without merit. Both the Supreme Court of the State of New Jersey, in an opinion by Justice Brennan, and the Court of Appeals of the State of New York have unanimously held in decisions, which are entirely persuasive and which we respectfully commend to this Court, that there is no conflict between Section 8 of the Waterfront Commission Act and Section 7 of the National Labor Relations Act. *Hazelton* v. *Murray*, 21 N. J. 115, 121 A. 2d 1 (1956); *De Veau* v. *Braisted*, 5 N. Y. 2d 236, 157 N. E. 2d 165 (1959) (now on appeal to this Court).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM P. SIRIGNANO,
Director of Law and Enforcement
of the Waterfront Commission of
New York Harbor,
Counsel for Respondent,
15 Park Row,
New York 38, New York.

Of Counsel:

HAROLD N. MCGOWAN,
Assistant Director of Law
and Enforcement.

IRVING MALCHMAN,
Assistant Counsel.

Dated: August 28, 1959.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 275

In the Matter of LOCAL 824, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION (Ind.),

Petitioner,

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

In the Matter of JOHN BOWERS,

Petitioner,

—against—

WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

HENRY A. LOWENBERG
Attorney for Petitioners
51 Chambers Street
New York, N. Y.

Of Counsel
SYDNEY HYMAN

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONERS' REPLY BRIEF

This Reply Brief is submitted in opposition to the brief submitted by Respondent to this Honorable Court.

In its brief in opposition, the respondent relies upon four points:

1. The controversy has become moot;

2. That petitioners have failed to obtain a judgment by the highest Court of the State of New York;

3. That the judgment of the Court of Appeals rests upon independent non-constitutional grounds; and

4. That there is no merit to the multiplicity of objections asserted by the petitioners as to the constitutionality of *Section 8* of the *Waterfront Commission Act.*

With respect to respondent's *first point*, that the controversy has become moot, it is strongly contended that the controversy has not become moot. With respect to that point, respondents strongly rely upon the case of *St. Pierre* v. *U. S.*, 319 U. S. 41. However, the respondent has failed to state to this Honorable Court that a petition for a writ of certiorari was granted in that case by this Honorable Court. It should be noted that, in that case, this Honorable Court emphasized the fact that the defendant neither applied for bail or for a stay.

In the case at bar, a motion was first made in the Supreme Court of the State of New York to quash, vacate and set aside the subpoenaes served upon the petitioners, which motion was denied. A Notice of Appeal was then filed in the Appellate Division of the Supreme Court, First Department, and a motion was made for a stay of such subpoenaes by the petitioners, which motion was granted. The Appellate Division of the Supreme Court, First Department, affirmed the order of the Supreme Court of the State of New York. A Notice of Appeal was then served as a matter of right to the Court of Appeals of the State of New York, pursuant to *Section* 588, subdivision 1(a) of the Civil Practice Act, contending that there was directly involved

the construction of the Constitutions of the State of New York and of the United States.

An application was then made to Judge Fuld, of the Court of Appeals of the State of New York, for a further stay of the subpoenaes served upon the petitioners, which application was denied by Judge Fuld; so that, whenever and wherever possible, motions were made for a stay of the subpoenaes issued by the respondent and served upon the petitioners.

In addition thereto, it is urged that the case of *U. S. v. Rock Royal Co-Op*, 307 U. S. 533, establishes beyond any contention that the matter at bar has not become moot. In that case, the Secretary of Agriculture, after holding public hearings pursuant to the *Agricultural Marketing Agreement Act of 1937*, issued an order which was subsequently suspended since a lower Court decree affected its administration and enforcement. Yet this Court, at page 555 in that case, stated as follows:

> "Since this suspension is authorized by the statute and the Order preserves accrued rights, we are of the opinion this step does not make these proceedings moot. Reports of their receipts and classified sales of milk, accounting of their pool obligations in the determination of the uniform price and settlement with their producers on the basis of this Order, as well as the payment of money, are sought from the defendants. The controversy over the validity of the Order and the power to enforce its provisions remains."

Also, in the case of *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 499, a motion was made by the respondent to dismiss the appeal for being moot, on the ground that the ruling, which was the subject

of the proceedings, was no longer in effect. There, this Honorable Court, at page 515, stated as follows:

> "In the case at bar, the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, *capable of repetition, yet evading review*, and at one time the Government and at another time, the carriers have their rights determined by the Commission without a chance of redress." (Italics mine)

In the case at bar, while we are not dealing with the Secretary of Agriculture or with the Interstate Commerce Commission, we are dealing with the Waterfront Commission of New York Harbor, which has control over the entire waterfront of the States of New York and New Jersey. No one may work on this waterfront unless he is registered by the Waterfront Commission of New York Harbor, and given a license to work. The influence of the respondent is as great as the influence of the Secretary of Agriculture or the Interstate Commerce Commission.

This Court must be cognizant of the fact that the economy of our country depends upon the flow of imports and exports to and from our country, in the largest port of our country, the Port of New York—and that over that Port, the respondent has jurisdiction.

As has been pointed out in the brief submitted by petitioners for a writ of certiorari, the power of subpoena on the part of the respondent is still prevalent.

Just as has been stated in the case of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission* (*supra*), while the orders of the I.C.C. are usually continuing, the subpoena power of the respondent is surely continuing. Certainly, there cannot be any difference between rates set by the I.C.C. or the Secretary of Agriculture, carrying out the obligations of his office, and the Waterfront Commission of New York Harbor, which has been vested with jurisdiction over the entire Ports of New York and New Jersey by the Legislatures of New York and New Jersey and the Congress of the United States. At least, the respondent contends that it has the power of subpoena and jurisdiction over any labor organization which has anything to do with the waterfront, and has the power to determine who is or who is not to work on the waterfront.

The order of the Secretary of Agriculture may affect the prices of farm products, the orders of the Interstate Commerce Commission may affect the rates of transportation, but, surely, when the largest port in our country is affected by the action of the respondent, it becomes of equal importance to this Honorable Court as the actions of the Secretary of Agriculture or the Interstate Commerce Commission.

Here, it may appear that the effect is local but the repercussions must be felt throughout the entire country. In addition to affecting the economy of our country, thousands upon thousands of people are directly involved in the work engaged in in the Ports of New York and New Jersey.

It is therefore submitted that the controversy has not become moot.

In "*Point II*", respondent argues in its brief that petitioners have failed to obtain a judgment by the highest court of the State, in which a decision could be had, as required by *Section 1257* of *Title 28*.

After the Notice of Appeal to the Court of Appeals of the State of New York was served and filed as a matter of right, pursuant to *Section 588, subdivision 1(a)* of the *Civil Practice Act of the State of New York*, a written Notice of Motion was made by the respondent to dismiss the appeal, upon the grounds that there were no constitutional questions directly involved. This motion, made by the respondent, was denied by the Court of Appeals of the State of New York, the highest Court in the State of New York, with leave to the respondent to renew said motion upon argument. The Court of Appeals, by the denial of said motion made by the respondent, not only agreed to review and determine the case at bar, but also agreed to hear and determine all issues which would be presented to that Court.

The only questions which could be presented to that Court were the questions which involved the constitutionality of *Section 8* of the *Waterfront Commission Act*. As has been pointed out in the brief submitted with the petition for a writ of certiorari, *Section 8* is directly involved.

After argument, Judge Fuld, of the Court of Appeals, asked counsel for the respondent whether he renewed his motion to dismiss this appeal for lack of a direct constitutional question being involved. Mr. Sirignano, counsel to the Waterfront Commission of New York Harbor, the respondent herein, then made his motion to dismiss the appeal. By a divided Court, the Court of Appeals of the

State of New York granted the motion. Judge Froessel, in an opinion concurred in by Judge Van Voorhies, dissented.

To apply then for permission to appeal to the Court of Appeals, would be fruitless and useless. The only application which could be made for permission to appeal, would be identical, using the same argument which was made on the appeal itself. The only question then involved—and still involved—is the constitutionality of *Section 8* of the *Waterfront Commission Act*, according to the Constitutions of the State of New York and of the United States. It would have been fruitless, useless and an insult to the Judges of the Court of Appeals of the State of New York to repeat the same, identical arguments on a motion for permission to appeal to that Court. Surely, the Appellate Division of the Supreme Court, First Department, likewise would have considered it a waste of time and an insult to the intelligence of the Judges of that Court.

It appears that the respondent relies, in great measure, upon the case of *McMaster* v. *Gould*, 276 U. S. 284, in support of this point. In that case, a motion to dismiss the appeal was made in the Court of Appeals of the State of New York, and the motion granted. The petitioners in that case then applied to the Appellate Division of the Supreme Court of the State of New York for leave to appeal. This motion was denied. In that case, however, no motion was made to the Court of Appeals of the State of New York, the highest Court of the State of New York, for leave to appeal, so that, in that case, there was merely an order by an intermediate lower court denying permission to appeal. The petitioners in that case elected to petition the Appellate Division of the Supreme Court of the State of New

York for permission to appeal to the Court of Appeals of the State of New York, and did not, upon denial, apply to the Court of Appeals for permission to appeal to that Court.

In the instant case, however, the Court of Appeals of the State of New York had before it all the questions which could be raised with respect to the appeal of the petitioners. There is not one additional, solitary question which could be presented to that Court. Surely, the order of the Court of Appeals of the State of New York, dismissing the appeal, is the final judgment and final order.

On page 286, in the case of *McMaster* v. *Gould* (*supra*), this Honorable Court stated as follows:

> "And since petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the Court of Appeals for such leave, the judgment is not that of the highest Court of the State in which a decision could be had."

As has been pointed out in the case at bar, there is an order by the highest Court of the State of New York dismissing this appeal. As has been pointed out, it would have been fruitless and useless to petition the highest Court of the State of New York for leave to appeal for the reason that the same constitutional questions presented on the argument would have to be presented in a petition for leave to appeal. For that reason, petitioners have elected not to do so. If there were any other question which could be raised, which was not raised in the brief of petitioners to the Court of Appeals of the State of New York, or upon the argument, a motion for leave to appeal to the Court of Appeals would have been made, but the identical questions

presented to this Honorable Court were the questions presented to the Court of Appeals of the State of New York, and there are no additional questions to be presented.

In the case of *Betts* v. *Brady*, 316 U. S. 455, the petitioner applied to the Chief Judge of the Maryland Court of Appeals for a writ of habeas corpus, which was denied. A writ of certiorari was applied for on the ground that the denial was a final judgment. The law of Maryland provides for further applications. This Honorable Court, at page 460, stated as follows:

> "It is true that the order was not final and the petitioner has not exhausted State remedies in the sense that in Maryland . . . a petitioner may apply successively to one judge after another and to one court after another, without exhausting his right. We think this circumstance does not deny to the judgment in a given case the quality of finality requisite to this court's jurisdiction. Although the judgment is final in the sense that it is not subject to review by any other court of the state, we may, in our discretion, refuse the writ, when there is a higher court of the state to which another petition for the relief sought, could be addressed, but this is not such a case."

In the case of *Betts* v. *Brady* (*supra*), this Honorable Court realized the futility of the petitioner going from one judge to another, when the Chief Judge of the Maryland Court of Appeals denied the writ of habeas corpus. Surely, the same principle applies to the instant case. The Court of Appeals of the State of New York, the highest Court in the State of New York, has decreed and ordered that the appeal of the petitioners be dismissed on the grounds that

there were no constitutional questions directly involved. This situation can most favorably be compared to the case of *Betts* v. *Brady*, (*supra*). In that case, this Honorable Court recognized that the Chief Judge of the Maryland Court of Appeals dismissed the writ of habeas corpus and that any future applications would be fruitless and useless.

In the case at bar, the Court of Appeals of the State of New York, the highest Court in the State of New York, has dismissed the appeal of the petitioners for the lack of constitutional questions being directly involved. What difference can there be between the Chief Judge of the Maryland Court of Appeals, sitting for the Court of Appeals of the State of Maryland, and the action by the Court of Appeals of the State of New York in the case at bar?

The respondent contends, in its brief in opposition, to this Honorable Court, that the judgment of the State Courts rests upon independent non-constitutional grounds and that the multiplicity of objections asserted by petitioners to the constitutionality of *Section 8* of the *Waterfront Commission Act* are without merit.

It would serve no purpose to again state the argument set forth in the brief of the petitioners to this Honorable Court, submitted on the petition for a writ of certiorari as to the unconstitutionality of *Section 8*, and the fact that *Section 8* of the *Waterfront Commission Act* is directly involved in this appeal.

In addition to the argument set forth by the petitioners in their brief to this Honorable Court, it is now contended that the new *Federal Labor Act* has pre-empted the entire field governed by *Section 8* of the *Waterfront Commission*

Act. The new *Federal Labor Act* is entitled "*Labor-Management-Reporting and Disclosure*" Act of 1959.

It is urged that *Sections 1* and *2* and the definitions contained in *Section 3 of that Act* clearly show that Congress has occupied and federally preempted the area covered by *Section 8* of the *Waterfront Commission Act*.

Section 504 of this *new Labor Bill* provides, in substance, that no person who has been convicted of, or served any part of a prison term, resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury or a violation of *Title 2 and 3 of the Act*, or conspiracy to commit any such crimes, shall serve as an officer, director or trustee, member of any executive board, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, for five years after such conviction or after the end of such imprisonment.

That Section further provides that no labor organization or officer thereof shall knowingly permit any person to assume or to hold any office or paid position, in violation of that section, and any person who wilfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 8 of the *Waterfront Commission Act* provides that no person shall solicit, collect or receive any dues, assessments, fines or contributions from employees registered or licensed pursuant to the provisions of the Act, for or on behalf of any labor organization representing any such em-

ployees, if any officer, or agent of such organization had been convicted by a Court of the United States, or any State or Territory thereof, of a felony, unless he has been subsequently pardoned therefor by the Government or other appropriate authority of the State or jurisdiction in which such conviction was had, or has received a Certificate of good conduct from the Board of Parole, pursuant to the provisions of the *Executive Law*, to remove the disability.

The evils of that Section intended to be dealt with by the States of New York and New Jersey have now been dealt with by the Congress of the United States, and that field has been fully and completely occupied and pre-empted by the Federal Government.

The *new Labor Law, Section 504(a) and (b)*, makes it a crime for a felon to become an officer, director, trustee, member of any executive board, business agent, manager, organizer or other employee, as heretofore stated, of any labor organization, for a period of five years after such conviction or after the end of such imprisonment. In addition thereto, it makes it a crime for any officer of any labor organization to knowingly permit any person to assume or to hold any office or particular position in violation of this section. That is precisely what *Section 8* intended to deal with. *Section 8* of the *Waterfront Commission Act* places the criminal responsibility on the man who collects dues on behalf of the labor organization, and not on the felon. Besides, the Federal Government having pre-empted this entire field, it would appear that *Section 8* of the *Waterfront Commission Act* is diametrically opposite and opposed to the *new Labor Act*.

In that instance, the Federal law must be solely recognized and the State law must give way to the Federal Law. In addition thereto, *Section 8* of the *Waterfront Commission Act* does not provide that a person collecting dues must have knowledge that any officer of the labor organization had been convicted of any felony, in any Court, in any State or in any Territory of the United States, of a felony, but the *new Labor Act, Section 504*, provides clearly that no labor organization, or officer thereof, shall knowingly permit any person to assume or to hold any office or particular position in violation of this subsection.

It has been contended by the petitioners, in their brief to this Honorable Court, accompanying the petition for a Writ of Certiorari, that the absence of knowledge, in *Section 8* of the *Waterfront Commission Act*, is a denial of due process. The Congress of the United States has recognized the fact that knowledge is required in order to satisfy due process. The Congress of the United States has inserted "knowledge" in *Section 504* of the *new Labor Act*, while *Section 8* of the *Waterfront Commission Act* does not contain the word "knowledge".

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY A. LOWENBERG
Attorney for Petitioners